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No. 84-1857

# In the Supreme Court of the United States

OCTOBER TERM, 1985

GERALD WILLIAM LUCKER, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioners are entitled to compensation under the Just Compensation Clause of the Fifth Amendment for an alleged taking of their property as the result of a 1979 Executive Agreement between the United States and the People's Republic of China (PRC) that settled the claims of United States nationals against the PRC, because the amount petitioners realized under the settlement agreement was less than the amount the Foreign Claims Settlement Commission determined to be the full value of petitioners' physical assets in China when they were expropriated by the PRC in 1950.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A8-A9) and the order of the Claims Court (Pet. App. A10) are unreported. The opinion of the court of appeals in *Shanghai Power Co* v. *United States* (Pet. App. A28-A31), upon which the court of appeals relied in the instant case, also is unreported. The opinion of the Claims Court in *Shanghai Power* (Pet. App. A32-A91) is reported at 4 Cl. Ct. 237.

### JURISDICTION

The judgment of the court of appeals was entered on February 28, 1985. The petition for a writ of certiorari was filed on May 28, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

## STATEMENT

1. Petitioners are United States citizens who are successors in interest to a United States corporation and citizen who owned property in China that was expropriated by the People's Republic of China (PRC) in 1950. That property consisted of a three-story residence and adjoining garage in Tientsin, China, that were owned by Harry A. Lucker, and a three-story commercial building and an automobile dealership in Tientsin that were owned by the American Chinese Company, Federal, Inc., a United States corporation. See Pet. App. A15-A17.

In 1966, Congress added a new Subchapter V to the International Claims Settlement Act of 1949, authorizing the Foreign Claims Settlement Commission to receive and determine claims of United States nationals against the PRC. See 22 U.S.C. 1643 *et seq.* The purpose of the amendment was to provide for an evaluation of the amount and validity of these claims before the evidence relating to them became even more dated, so that this information would be available to the Executive Branch in the event it became feasible at some time in the future to resolve the claims against the PRC.

To this end, the Commission was to certify to the Secretary of State, as well as to the individual claimant, the amount of the loss or damage it determined to have been suffered by the claimant. 22 U.S.C. 1643f(a). However, Congress made clear that the authorization for the Commission to determine the amount of such claims "shall not be construed as authorizing an appropriation or as any intention to authorize an appropriation for the purpose of paying such claims." 22 U.S.C. 1643. To reiterate this limitation, Congress, through 22 U.S.C. 1643, also incorporated into the China claims program the terms of 22 U.S.C. 1626(f), which provides that nothing in the relevant subchapter "shall be construed as the assumption of any liability by the United States for the payment or satisfaction, in

whole or in part, of any claim on behalf of any national of the United States against any foreign government."

Claims were submitted to the Commission on behalf of petitioners' predecessors in interest. The Commission in 1970 determined that Harry Lucker had suffered a loss of $70,000 and that the American Chinese Company had suffered a loss of $50,000 as a result of the expropriations in 1950, exclusive of interest since that date. The Commission determined that the total amount of the claims of all United States nationals against the PRC was $196,861,841, exclusive of interest. Pet. App A17-A19.

2. On May 11, 1979, the United States entered into an Executive Agreement with the PRC under which the claims of United States nationals against the PRC were settled for an aggregate amount of $80.5 million. Pet. App. A1-A7. In 1980, Congress amended the International Claims Settlement Act by adding a new 22 U.S.C. 1627(f) to provide for the deposit of the $80.5 million in a special account in the Treasury and for the distribution of these funds on a pro rata basis to persons who had been determined by the Commission to have had valid claims against the PRC. Petitioners have alleged that, based upon the Commission's determinations in 1970, the value of their portion of the two claims against the PRC as of May 11, 1979, was $153,000 including simple interest and $469,722 including compound interest since 1950 (Pet. 8-9; Pet. App. A21),[1] but that they will realize only $36,800 under the Executive Agreement and statutory distribution formula (Pet. App. A23-24).

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[1]Petitioners do not explain the basis on which the latter figure was calculated. As noted above (see page 3, *supra*), the Commission determined that Harry Lucker and the American Chinese Company suffered losses of $70,000 and $50,000 respectively. However, petitioners state (Pet. 9 n. 5) that the amount of the losses certified by the Commission was reduced by one-fourth because one of the parties in interest, who holds a 25% interest, has not joined as a party in this suit.

3. On September 27, 1983, petitioners filed this action in the United States Claims Court, alleging that the settlement agreement with the PRC resulted in a "taking" of their property by the United States for a public use, requiring the payment of compensation under the Just Compensation Clause of the Fifth Amendment to the extent that the amount they will realize pursuant to the Agreement and the statutory distribution formula is less than the amount certified by the Commission, plus compound interest since 1950 (Pet. App. A12-A27). Petitioners sought to represent a class of all persons whose claims against the PRC were settled by the Executive Agreement (*id.* at A13-A15, A25-A27).

By order dated December 30, 1983, the Claims Court dismissed the complaint on the basis of its opinion of the same date in *Shanghai Power Co.* v. *United States*, 4 Cl. Ct. 237, which presented an identical claim for just compensation arising out of the settlement with the PRC (Pet. App. A10, A32-A91). The court of appeals affirmed in a brief unpublished opinion dated February 28, 1985 (*id.* at A8-A9), relying on its affirmance of the Claims Court's judgment in *Shanghai Power* (*id.* at A28-A31).[2]

**ARGUMENT**

The petition for a writ of certiorari in this case presents the same issue that is presented in *Shanghai Power Co.* v. *United States*, petition for cert. pending, No. 85-65, which seeks review of the court of appeals' decision in the companion *Shanghai Power* case. For the reasons stated in the brief in opposition filed on behalf of the United States in *Shanghai Power*, a copy of which we have furnished to counsel for petitioners, the petition for a writ of certiorari in

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[2]Judge Miller would have affirmed on the ground that recovery was barred in the Claims Court because petitioners' claim is one "growing out of" or "dependent upon" a treaty within the meaning of 28 U.S.C. 1502 (Pet. App. A9, A31).

this case should be denied. We offer the following additional comments to respond to several points raised by petitioners herein that are not raised in *Shanghai Power*.

1. In the brief in opposition in *Shanghai Power* (85-65 Br. in Opp. 20-22), we have shown that the decision of the court of appeals in this case does not conflict with any decision of this Court or of another court of appeals. That discussion answers petitioners' reliance (Pet. 21-31) on essentially the same decisions upon which the petitioner in *Shanghai Power* relies in support of its claim for just compensation.

Petitioners also cite (Pet. 24-26) two additional decisions of this Court — *Comegys* v. *Vesse*, 26 U.S. (1 Pet.) 193 (1828), and *Cities Service Co.* v. *McGrath*, 342 U.S. 330 (1952) — but neither has any bearing on this case. The former case raised the question whether, under the bankruptcy laws, the bankrupt's assignees were entitled to the amount that vested in a person who had a claim against Spain but who had been found by a treaty commission to be entitled to an award for unjustly captured vessels. See 26 U.S. (1 Pet.) at 217-221. The portions of the opinion upon which petitioners rely (see Pet. 24-25) state that the payments received were to be regarded not as mere donations by a foreign government, but as payments in satisfaction of a right to compensation from that government. 26 U.S. (1 Pet.) at 216-217. Contrary to petitioners' assertion (Pet. 25), there is no discussion of any rights the claimants might have against the United States.[3]

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[3]Although petitioners set off a sentence in block form and thereby suggest that they are quoting from the Court's opinion in *Comegys* v. *Vasse* (see Pet. 25), that sentence does not appear at the cited pages of the Court's opinion. It instead seems to be petitioners' own paraphrasing of the Court's statements regarding claims against a foreign government.

The *Cities Service* case involved an interpretation of the Trading with the Enemy Act, under which Cities Service was required to pay the Attorney General, as the successor in interest to the Alien Property Custodian, the money that was due to foreign bondholders upon the maturity of certain obligations. The Court concluded that if Cities Service later were held by a foreign court to be liable to the bondholders for the amount due on the bonds, it would be entitled to just compensation for a taking by the United States to the extent of the company's double liability. 342 U.S. at 335-336. *Cities Service* thus involved the potential foisting of double liability on a United States national for a debt owed by that national to a foreign national that was evidenced by a negotiable bearer debenture located in the United States. That potentiality is something quite different from the Executive's settlement in the instant case of claims of United States nationals *against* a foreign government for that government's actions within its own territory. No such international settlement agreement was involved in *Cities Service*, and that case therefore sheds no light on petitioners's asserted right to just compensation.[4]

2. Petitioners also argue (Pet. 31-41) that the decision by the courts below regarding the value in 1979 of petitioners' claims against the PRC is inconsistent with the finality clause in 22 U.S.C. 1632(h). That clause provides that "the action of the Commission in allowing or denying a claim under this subchapter shall be final and conclusive on all

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[4]In *Hidalgo County Water Control & Improvement District* v. *Hedrick*, 226 F.2d 1 (5th Cir. 1955), also cited by petitioners (Pet. 31), the treaty involved was construed in a manner that avoided a taking issue. 226 F.2d at 6-8. Moreover, *Hidalgo County* did not involve a claim by United States nationals against a foreign government, but rather a domestic dispute among United States nationals in which it was alleged that a treaty with Mexico had adjusted the relative water rights of the parties. That case therefore has no bearing whatever on this case.

questions of law and fact" and shall not be subject to review by any other government agency or a court. Petitioners' reliance on this provision is without merit.

The Claims Court and court of appeals did not question the Commission's allowance of petitioners' claims for the purposes that are addressed by the International Claims Settlement Act. The Commission's function was to determine and certify to the Secretary of State the amount of "the loss or damage suffered by the claimant" (22 U.S.C. 1643f(a)) — which in this case was measured by the value of the physical assets in China at the time they were expropriated by the PRC in 1950 — for the limited purposes of informing future diplomatic negotiations with the PRC and of calculating the pro rata share that each claimant might receive out of a lump sum settlement with the PRC. The finality clause in 22 U.S.C. 1623(h) was intended to resolve the question of pro rata participation in a conclusive manner, without the need for further administrative or judicial proceedings.

The finality clause does not address the quite different question, involved in this case, of the *absolute* value in 1979 of any particular individual's claim against the PRC. That value must take into account the likelihood of recovering from the PRC in 1979, and it bears no necessary relationship to the value assigned by the Commission to the physical assets in China when they were seized 29 years earlier. It is especially clear that the Commission's action in allowing a claim cannot control the value of the claim against the PRC for purposes of petitioners' suit seeking compensation from the United States, because the International Claims Settlement Act itself makes clear that it is not to be construed as the assumption of any liability by the United States for the payment of any claim against a foreign government. 22 U.S.C. 1627(f), 1643.

## CONCLUSION

For the foregoing reasons and the additional reasons stated in the brief in opposition in *Shanghai Power Co.* v. *United States*, No. 85-65, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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